Supreme Court, U
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MICHAEL RODAK, JR.,

No. 80-136

IN THE

Supreme Court of the United States

October Term, 1980

WANDA P. CHOCALLO, Administrative Law Judge,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF SIMON NASH, *AMICUS CURIAE*

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TABLE OF CONTENTS.

	Page
Statement of Interest of *Amicus Curiae*	1
The Facts	3
The Question	4
Summary of Argument	5
Argument	7
Conclusion	10

	Text	Reference
Appendix A: Statutes and Regulations:	11	
Social Security Act:		
Section 205(b)	11	1,2,3,5,8
Section 205(l)	11	1,5
Administrative Procedure Act:		
5 U.S.C. 551	12	5,8
5 U.S.C. 556	12	2,5,6,7,8
Regulations of Secretary:		
20 C.F.R. 404.921	13	6,9
20 C.F.R. 416.1429	13	6
20 C.F.R. 404.941	14	4,6,9
20 C.F.R. 416.1459	14	4,6
Appendix B: Original Delegation of Agency Authority to the Appeals Council: Extract from Federal Register, Vol, II, pp. 177A-567,8, September 11, 1946	15	7

TABLE OF AUTHORITIES.

Butz v. Economou, 438 U.S. 478 (1978) 10
Nash v. Califano, 613 F.2d 10 (CA-2-1980) 2,8,9

Statement of Interest of *Amicus Curiae*

I am an Administrative Law Judge (ALJ) appointed under 5 U.S.C. 3105 and I am assigned to the Buffalo, New York, field office of the Office of Hearings and Appeals of the Social Security Administration of the United States Department of Health and Human Services.

I am submitting this brief, as *amicus curiae,* under the provisions of Rule 36.

Under Section 205 (b) of the Social Security Act, 42 U.S.C. 405 (b), the Secretary of the Department is required to afford hearings to persons whose applications for benefits have been denied by the Social Security Administration. The proceedings are governed by the provisions of the Administrative Procedure Act (A.P.A.), 5 U.S.C. 550 *et seq.* Under Section 205 (l) of the Social Security Act, 42 U.S.C. 405 (1), the Secretary is "authorized to delegate to any member, officer, or employee of the Department . . . designated by him any of the powers conferred upon him by this section, . . ."

I am one of 650 ALJs, appointed under the A.P.A., to whom the Secretary has delegated his authority to hold Social Security hearings in 150 field offices throughout the United States. The Secretary has also purported to delegate that same authority—to hold hearings under Section 205 (b)—to his "Appeals Council," a 10-member appellate body, created by him, whose members are not ALJs, who only recently were required even to be lawyers, and who serve at the pleasure of the Secretary, or, in actuality, at the pleasure of his delegate, the Associate Commissioner of Social Security, who himself is Chairman of the Appeals Council, as well as administrative supervisor of all personnel of the Office of Hearings and Appeals, including the ALJs.

I brought an action in the United States District Court for the Western District of New York on May 30, 1978. I sought a declaratory judgment against the Secretary on six questions, one of which was the authority of the Secretary to delegate to the non-ALJ members of the Appeals Council the authority to "hold a hearing" or, as described in 5 U.S.C. 556 (b) to "preside at the taking of evidence." The District Court dismissed the amended complaint for lack of standing. The Court of Appeals for the Second Circuit reversed and remanded, but only on three of the six questions raised in the amended complaint. *Nash v. Califano*, 613 F. 2d 10 (1980). The Court of Appeals apparently affirmed the holding of the District Court that I had no standing to challenge the Secretary's delegation to members of the Appeals Council of his authority to hold hearings, 613 F. 2d 10, 17.

On August 4, 1980, the petitioner herein sent me a copy of the petition and suggested that I might wish to submit a brief under Rule 36, because the same question involved in her case before the Court of Appeals for the Third Circuit was also involved in my case before the Court of Appeals for the Second Circuit. The question is: May the Secretary lawfully delegate his "agency" power *to hold hearings* to any officers but ALJs? If he may not, then it would follow that the Appeals Council could not lawfully issue an order "removing *to itself*" (for hearing and initial decision) a case which had been duly assigned to an ALJ (for hearing and initial decision).

My primary interest in this case is to obtain an authoritative court ruling on the question of the legality of the delegation to non-ALJ members of the Appeals Council of the Secretary's power to hold hearings under Section 205 (b) of the Social Security Act. I maintain

that this is no mere academic question, but one of great importance, because, as things are now (and have been since 1940) the managerial functions and the judicial functions of the Office of Hearings and Appeals are combined in the Appeals Council—and, more particularly in the Associate Commissioner, who is also Chairman of the Council. If my argument is accepted, it might lead to a change, where, under the Secretary, as the "agency", the managerial, disciplinary, and supervisory branch—represented by the Associate Commissioner with his large bureaucracy of managers—would be *separated* from the judicial branch—represented by the ALJs as the "trial judges" and the Appeals Council as the "appellate judges", just as the prosecutorial functions have been separated from the judicial functions in the regulatory agencies since the passage of the A.P.A. in 1946.

In the case now before this Court, if it is found that the Appeals Council and its members do not have lawful authority to hold initial hearings under Section 205 (b), then the Council's orders, divesting the petitioner of jurisdiction *and* taking jurisdiction "to itself" (to hold the hearing and issue the initial decision) should be declared to be void. Under this view, this Court should issue the writ of certiorari prayed for by the petitioner. This brief, therefore, is in support of the petition.

The Facts

The petitioner was an ALJ, hearing and deciding Social Security cases in Philadelphia. In due course, the claim of William L. Macklin, Sr., was assigned to her for hearing and initial decision. While the case was pending before her, the Appeals Council issued two orders, pur-

porting to divest the petitioner of jurisdiction of the Macklin case and purporting to remove the case to itself. The Appeals Council issued the orders, pursuant to 20 C.F.R. 404.941 and 416.1459, which provide as follows: "The Appeals Council on its own motion may remove to itself any request for hearing pending before a presiding officer . . ." The petitioner refused to comply with the orders of the Appeals Council, insisting on her right and obligation to proceed with a hearing and to issue an initial decision. She accordingly refused to turn over the case files to the Appeals Council, as directed by the orders. The United States sued her, seeking declaratory, mandamus and injunctive relief, on behalf of the Secretary.

The District Court, Hon. John P. Fullam, granted the Government's motion for summary judgment, holding ". . . it is evident that the Appeals Council is empowered to divest the defendant of jurisdiction over the Macklin claim under 20 C.F.R. 404.941 and 416.1459, and to determine the matter itself . . ." The Court of Appeals for the Third Circuit affirmed, with a *per curiam* Judgment Order, ". . . for the reasons set forth in the district court opinion by the Honorable John P. Fullam." The petitioner now seeks a writ of certiorari from this Court.

The Question

Did the Appeals Council have lawful authority, under 20 C.F.R. 404.941 and 416.1459, to issue the orders of September 8, 1978, and December 11, 1978, which purported to divest the petitioner of jurisdiction to hold a hearing and issue an initial decision in the case of William L. Macklin, Sr.?

Summary of Argument

1. In cases under Section 205(b) of the Social Security Act, the "agency", within the meaning of 5 U.S.C. 551, is the Secretary of Health and Human Services; the "agency" is not the Appeals Council.

2. Under Section 205(l) of the Social Security Act, the Secretary may delegate to any subordinate or group of subordinates, including the Appeals Council, all of his authority under Section 205(b), except his authority to hold a hearing, or, in the words of the statute, "to preside at the taking of evidence".

3. The Secretary may not delegate hearing authority to the non-ALJ members of the Appeals Council, because, under the A.P.A., 5 U.S.C. 556(b), the agency itself must hold the hearing (*i.e.*, the Secretary, himself—or, herself, as it should be understood throughout this brief—) or, if the agency delegates the hearing authority, it must delegate it to one or more ALJs, appointed under the A.P.A.

4. Once the Secretary has made a valid delegation of jurisdiction to an ALJ, he, himself, as the "agency", has authority to divest the ALJ of jurisdiction, but only if he, himself, chooses to hold the hearing in person; even the Secretary, the agency, may not lawfully divest an ALJ of jurisdiction and then assign the case to another ALJ, since the A.P.A. requires cases to be assigned in rotation, and the action of the agency, divesting one ALJ and giving the case to another ALJ, would be arbitrary and capricious, as a violation of the agency's own procedures.

5. Since 5 U.S.C. 556(b) limits the Secretary's authority to delegate his hearing authority to ALJs only, the Secretary's Regulations, 20 C.F.R. 404.921 and 416.1429, purporting to delegate that authority to non-ALJ "members of the Appeals Council", are unlawful.

6. Since the non-ALJ members of the Appeals Council have no lawful authority to hold a hearing and issue an initial decision, the Secretary's Regulations, 20 C.F.R. 404.941 and 416.1459, purporting to authorize the Appeals Council "to remove to itself any request for hearing pending before a presiding officer", are also unlawful.

7. Since the Appeals Council had no lawful authority to issue the orders in question, the petitioner had no legal obligation to comply with them.

8. The District Court erred in holding that the Regulations were valid and that therefore the Appeals Council was "empowered to divest the defendant of jurisdiction . . . and to determine the matter itself".

9. Whether or not the *Macklin* claim was moot (the mootness of the claim was the purported reason for the action of the Appeals Council) was itself a question for initial determination by the petitioner; and the determination of that question was a matter within her judicial discretion.

10. The District Court erred in granting summary judgment for the respondent, the United States of America.

Argument

In 1940, six years before the passage of the A.P.A., the Social Security Board (the original "agency") established its "Office of Appeals Council" (See Appendix B). That "Office of Appeals Council" had two components: (1) A corps of 12 "referees", stationed in nine cities, to hold hearings on Social Security claims; and (2) an "Appeals Council", consisting of three members, with powers "to direct and supervise the referees ... and to review decisions." The Board further delegated "to the members of the Appeals Council and to the referees all necessary and appropriate powers to hold hearings and render decisions in accordance with such regulations as the Board shall adopt." The Board further delegated "to the members of the Appeals Council and the referees all necessary and appropriate powers to administer oaths and affirmations, issue subpoenas, examine witnesses and receive evidence." Thus, the Board specifically delegated complete hearing authority to the members of the Appeals Council, as well as to the referees, and, in addition, delegated to the Appeals Council appellate authority over the decisions of the referees.

The same delegation of authority has remained in effect until the present time. I submit, however, that the passage of the A.P.A., in 1946, rendered unlawful one part of the delegation to the members of the Appeals Council, namely, the delegation to hold hearings, since the "agency" (the Board, originally; the Federal Security Administrator, later; and the Secretary, today;) no longer had unrestricted power to delegate its hearing authority. The A.P.A. (5 U.S.C. 556(b)) limited the agency's authority to delegate, restricting such delegation of hearing authority to ALJs appointed under the A.P.A.

The Secretary, as the agency, has full power to delegate to the Appeals Council his authority to "direct" and "supervise" the ALJs, and to "review decisions" of the ALJs. But, after the passage of the A.P.A., the agency could no longer delegate hearing authority to the members of the Appeals Council, unless they were also ALJs, appointed under the A.P.A.

The delegation of hearing authority to non-ALJ members of the Appeals Council was first formally challenged in my case, *Nash v. Califano, supra.* On that point, the Government argued in the District Court that the Appeals Council was the "agency" under 5 U.S.C. 551. It is true that the Appeals Council, at first sight, "looks like" a typical multi-membered agency, like the I.C.C. or any other regulatory agency, with general appellate authority over a corps of ALJs. But Section 205(b) of the Social Security Act clearly establishes the Secretary as the agency, the "authority of the Government of the United States", 5 U.S.C. 551. In the Court of Appeals, the Government challenged my "standing" and also relied on an affidavit of Robert L. Trachtenberg that no member of the Appeals Council had ever, in fact, held a hearing. The Court of Appeals stated that I did not dispute the latter fact[1] and the Court indicated that

[1] I had no opportunity to dispute the affidavit of Mr. Trachtenberg, since it was submitted as an attachment to the Government's reply memorandum on its motion to dismiss my complaint. I submit that, ever since it was created, on March 1, 1940, the Appeals Council, its panels, and its individual members have "presided at the taking of evidence", within the meaning of 5 U.S.C. 556(b). Moreover, they have done so on a daily basis, both before and after the passage of the A.P.A. They have done so in this manner: When a claimant appeals from a decision of an ALJ, issued after a hearing, the Appeals Council and its members, as a matter of course, receive into evidence

(Footnote continued on following page)

the particular claim lacked merit, 613 F.2d 10, 17. I interpret the Court's decision as meaning that if I could show harm to me because of such delegation, or if the members of the Appeals Council were actually exercising the hearing authority specifically conferred on them (See Appendix A, 20 C.F.R. 404.921), I would have standing to challenge the delegation. At any rate, although the holding on this point may not be entirely clear, the implication is that the delegation might be held to be unlawful, if the point was raised in a proper case. In the instant case, however, the Court of Appeals for the Third Circuit has (by implication) upheld the delegation of hearing authority to the non-ALJ members of the Appeals Council, since it has specifically upheld 20 C.F.R. 404.941, which permits the Appeals Council to remove cases to itself. I have indicated above why I think the question is of importance. I also suggest that there is a conflict between the decision of the Second Circuit in my case and the decision of the Third Circuit in the petitioner's case, and that this Court should resolve the conflict.

I stated above that my primary interest in this case was to obtain a decision on the issue of the delegation of hearing authority to non-ALJ members of the Appeals Council. My secondary interest is to obtain a decision which will protect ALJs from arbitrary action by their employing agencies. In this case, the Appeals Council ostensibly took the case away from the petitioner,

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(Footnote continued from preceding page)

additional documents (affidavits, doctors' reports, hospital reports) and, on the basis thereof, reverse the decision of the ALJ. The Council and its members will also hear sworn testimony on requests for review, a procedure which I described in my complaint as supplemental hearings.

because the case was moot. But I submit that, whether the case was moot or not, was up to the petitioner to decide in the first instance, as the duly appointed ALJ. If she made a mistake in her decision, no great harm would have been done, since the admittedly proper function of the Appeals Council is to correct the mistakes of the ALJs. The petitioner refused to obey an order, which she thought had been issued without legal authority. As I have argued in this brief, I think she was right. But even if she had been wrong, her decision would have been a "judicial" decision, within the scope of her authority under the A.P.A. She has since been discharged from her position for her failure to obey two other orders of the Appeals Council, similar in all respects to the orders involved in the instant case. I suggest that, as an ALJ, she should be entitled to "absolute immunity" from adverse action by the agency, due to a mistake she may have made about the extent of her jurisdiction. In *Butz v. Economou*, 438 U.S. 478, this Court protected the ALJ from retaliation by a party to a proceeding before him. I suggest that it is equally appropriate in this case for the Court to protect the petitioner from the harsh penalty which she has incurred for asserting her right—as an ALJ—to refuse to obey orders, which, in the exercise of her judicial discretion, she believed to be unlawful.

Conclusion

Because the question is an important one, on which two Circuit Courts of Appeals have expressed differing views, this Court should issue the writ prayed for and decide the case on the merits.

Respectfully submitted,

SIMON NASH,
Amicus Curiae, pro se.

APPENDIX A

Statutes and Regulations

Section 205(b) of the Social Security Act, 42 U.S.C. 405(b)

(b) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this title. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

Section 205(l) of the Social Security Act, 42 U.S.C. 405(l)

(l) The Secretary is authorized to delegate to any member, officer, or employee of the Department of Health, Education and Welfare designated by him any of

the powers conferred upon him by this section, and is authorized to be represented by his own attorneys in court in any case or proceeding arising under the provisions of subsection (e).

Administrative Procedure Act, Title 5, United States Code

§551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

. . .

§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title . . . .

Regulations of the Secretary, Authorizing non-ALJ Members of the Appeals Council to Preside at Hearings

20 Code of Federal Regulations

20 CFR 404.921 Presiding Officer

The hearing provided for in this Subpart J, except as otherwise provided herein, shall be conducted by a duly appointed presiding officer. Such presiding officer shall be designated by the Director of the Bureau of Hearings and Appeals or his delegate. The Director or his delegate may also designate a member of the Appeals Council to conduct a hearing, in which case the provisions of this Subpart J governing the conduct of a hearing shall be applicable thereto.

20 CFR 416.1429 Presiding Officer

The hearing provided for in this Subpart N shall, except as herein provided, be conducted by:

(a) An administrative law judge appointed pursuant to 5 U.S.C. 3105; or

(b) A hearing examiner, SSI (hearing examiner, Supplemental Security Income), appointed pursuant to the authority of the Secretary as provided in section 1631(d)(2) of the Act.

Such presiding officer shall be designated by the Director of the Bureau of Hearings and Appeals or his delegate. Where a consolidated hearing is conducted as provided in §416.1436, the presiding officer designated shall be an administrative law judge. The Director may also designate a member or members of the Appeals Council to conduct a hearing, in which case the provisions of this Subpart N governing the conduct of a hearing by a presiding officer shall be applicable thereto.

Regulations of the Secretary, Authorizing the Appeals Council to remove pending cases to itself

20 C.F.R. 404.941 Removal of hearing to Appeals Council

The Appeals Council on its own motion may remove to itself any request for hearing pending before a presiding officer. The hearing on any matter so removed to the Appeals Council shall be conducted in accordance with the requirements of §§404.924 to 404.938, inclusive. Notice of such removal shall be mailed to the parties at their last known addresses.

20 C.F.R. 416.1459 Removal of hearing to Appeals Council

The Appeals Council on its own motion may remove to itself any request for hearing pending before a presiding officer. The hearing on any request so removed to the Appeals Council shall be conducted in accordance with the requirements of §§416.1433 to 416.1446, inclusive. Notice of such removal shall be mailed to the parties at their last known addresses.

APPENDIX B

Original Delegation of Authority to the Appeals Council

Extract from Federal Register, September 11, 1946

SOCIAL SECURITY ADMINISTRATION
[20 CFR, Ch. III]
Part 421—Statement of Organization

Subpart B—Office Of The Appeals Council

§421.6 *Organization of the office of the Appeals Council*—(a) *Authority and functions.* On March 1, 1940, the Social Security Board established the Office of Appeals Council and delegated powers to the members of this office by the following formal action:

In order to afford hearings as may be provided by regulations which the Board shall adopt with respect to benefit payments under Title II and with respect to the revision of wage records maintained by the Board, the Social Security Board, pursuant to authority conferred on it by the Social Security Act and the Social Security Act Amendments of 1939:

(a) Hereby establishes an Appeals Council, consisting of three members, one of whom shall act as Chairman of the Council and as the administrative officer;

(b) Hereby delegates to the Appeals Council all necessary and appropriate powers to direct and supervise the referees appointed by the Board and to review decisions in accordance with such regulations as the Board shall adopt;

(c) Hereby delegates to the members of the Appeals Council and to the referees all necessary and appropriate powers to hold hearings and render decisions in accordance with such regulations as the Board shall adopt;

(d) Hereby delegates to the members of the Appeals Council and the referees all necessary and appropriate powers to administer oaths and affirmations, issue subpoenas, examine witnesses and receive evidence.

On July 16, 1946, the functions of the Social Security Board were transferred to the Administrator of the Federal Security Agency. On July 16, 1946, the Administrator of the Federal Security Agency made the following delegation of authority to the Office of the Appeals Council:

d. All duties, powers, and functions relating to the holding of hearings, the rendition of decisions, and the review of decisions in connection with administrative appeals from determinations made under title II of the Social Security Act, as amended, and affecting benefits, lump sums or wage records, including the administration of oaths and affirmations, the issuance of subpoenas, the examination of witnesses and the receipt of evidence, and all duties, powers, and functions relating to judicial review of decisions made upon appeal, which were transferred from the Social Security Board by Reorganization Plan No. 2 of 1946 are assigned to the Office of Appeals Council in the Social Security Administration and shall be exercised by the Ap-

peals Council, its members and referees in accordance with applicable rules as from time to time amended by the Commissioner with the approval of the Administrator.

(b) Established offices. The Council consists of the Chairman and two members. There is also a staff of professional clerical and stenographic employees. The Chairman is responsible for the administration of the office. It is the function of the three members of the Appeals Council in Washington to pass on requests for review of decisions rendered by referees; render decisions where the request has been granted; review decisions of referees on its own motion; render decisions on cases certified by the referees and prepare and certify the record of the case where a civil action has been instituted to review a decision of the office. It is the function of the referees, as designated by the Chairman of the Appeals Council, to hold hearings and render decisions in cases where a request for hearing has been filed. The referee may, if he deems it advisable, certify the case to the Appeals Council for decision. A reporter is assigned to each referee.

The central office of the Office of Appeals Council is located in the Federal Security Agency Building, 4th and Independence Avenue. Washington, D. C. The field staff consists of 12 referees located at the following addresses:

1 Referee—120 Boylston Street, Boston 16, Mass.

3 Referees—11 West Forty-second Street, New York 18, N. Y.

1 Referee—1523 L. Street NW., Washington 25, D. C.

Appendix B—Original Delegation of Authority to the Appeals Council.

1 Referee—Euclid Avenue and East Ninth Street, Cleveland 14, Ohio.

1 Referee—Midland Bank Building, Fourth Floor, Minneapolis 1, Minn.

1 Referee—441 West Peachtree Street, Atlanta 5, Ga.

1 Referee—1006 Grand Avenue, Kansas City 6, Mo.

1 Referee—North Presa and East Houston Street, San Antonio 5, Tex.

2 Referees—785 Market Street, San Franciso 3, Calif.

Pursuant to section 3 of the Administrative Procedure Act (Public Law 404, 79th Cong.) the foregoing statements are hereby made this 27th day of August 1946.

[Seal] A. J. ALTMEYER,
Commissioner for Social Security.

Approved: August 28, 1946.

Maurice Collins,
Acting Federal Security Administrator.